Supreme Court, U.S.
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No. 97-1280

In The

Supreme Court of the United States

October Term, 1997

KAWERAK REINDEER HERDERS ASSOCIATION,

Petitioner,

vs.

THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC. and REINDEER HERDERS ASSOCIATION, INC.,

-and-

BRUCE BABBITT, SECRETARY OF THE INTERIOR and NILES CESAR, JUNEAU AREA DIRECTOR OF THE BUREAU OF INDIAN AFFAIRS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS THOMAS E. WILLIAMS, ALASKA REINDEER HERDERS, INC. AND REINDEER HERDERS ASSOCIATION, INC.,

WALTER T. FEATHERLY
Counsel of Record
KOVAL & FEATHERLY, P.C.
Attorneys for Respondents Thomas E. Williams, Alaska Reindeer Herders, Inc., and Reindeer Herders Association, Inc.
601 West Fifth Avenue
Suite 900
Anchorage, Alaska 99501
(907) 258-6600

145625

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTION PRESENTED

Did the Court of Appeals properly interpret the Reindeer Industry Act of 1937 as not prohibiting those other than natives in Alaska from owning reindeer?

STATEMENT PURSUANT TO RULE 29.6

There are no parent or subsidiary companies of the respondents, Alaska Reindeer, Inc. and Reindeer Herders Association, Inc.

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STATEMENT OF THE CASE

This case concerns an interpretation of the Reindeer Industry Act of 1937, an act which has no counterpart in any other state or federal legislation. The precise question for review is whether the Ninth Circuit properly rejected an interpretation of the Reindeer Act by the Interior Board of Indian Appeals (the "IBIA") that all persons in Alaska who are not natives are totally and perpetually banned from owning reindeer.

The petition, in which the United States has not joined, misstates the questions presented in this case. The question presented is not whether the rational basis standard of review for Indian classifications adopted by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974) continues to apply, because the Ninth Circuit did not hold that it does not. It is not whether application of the *Mancari* standard of equal protection review of Indian classifications is restricted to those addressing "uniquely Indian interests," because the Ninth Circuit did not hold that it is. Similarly, the question here presented is not whether the Reindeer Act, as construed by the IBIA to prohibit non-Natives from competing in the reindeer industry in Alaska, is constitutional, because the Ninth Circuit did not hold that the Reindeer Act is unconstitutional.

Rather, a unanimous panel of the Ninth Circuit held that the IBIA's interpretation of the Reindeer Act, as barring all in Alaska who are not Natives from owning imported reindeer, was wrong. All three members of the panel believed that the IBIA's interpretation was wrong because it was contrary to the plain language of the Act and all three declined to defer to the IBIA's interpretation. App. 1a-26a.

For these reasons, the questions that the Petitioner asks this Court to answer, questions about the application and continuing

validity of *Mancari* and the constitutionality of the Reindeer Act, while undoubtedly interesting and important, are merely hypothetical in the context of this case. In short, the Petitioner, by its own admission, seeks advisory opinions from this Court. It is scarcely necessary to urge this Court not to give them.

REASONS FOR DENYING THE WRIT

I.

THE NINTH CIRCUIT DID NOT DECIDE AN IMPORTANT QUESTION OF FEDERAL LAW THAT MUST BE SETTLED BY THIS COURT.

1. As noted above, the decision of the Ninth Circuit was that the Reindeer Act does not prohibit persons in Alaska who are not Alaska Natives from importing reindeer to Alaska. This is not an important question of federal law. The Reindeer Act by its terms affects only Alaska. The circuit court's decision directly affects only one person in Alaska, Respondent Thomas Williams, and indirectly affects (and only arguably so) only seventeen other Alaskans, the members of Petitioner who manage reindeer herds on a peninsula in the northwestern corner of Alaska. While this question has not been settled by this Court, there is no conceivable reason why it should be.

2. Similarly, the general principles that the Ninth Circuit panel judges employed in their decisions are neither important nor unsettled. For example, the debate between Judges Kozinski and Brunetti, as to whether under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), deference should be accorded to the IBIA's interpretation, is of no moment, because both reached the conclusion that, whatever the degree of deference, it is insufficient to withstand appellate court scrutiny and reversal.

The only disagreement among the circuit court panel members concerned their reasons for not giving total deference to the IBIA. Judge Brunetti explained in his concurring opinion that *Chevron* does not apply because the intent of Congress on the matter at issue in this case is clear from the "plain language of the Act." App. 26a. On the other hand, Judge Kozinski, writing for the majority, wrote that *Chevron* does apply, but nonetheless declined to defer to the IBIA because the IBIA's interpretation raised "grave constitutional doubts."

The fine question of whether Judge Kozinski or Judge Brunetti employed the correct analysis in deciding not to defer to the IBIA is not a question that has any import beyond the facts of this case. Whether this Court agrees with Judge Brunetti or Judge Kozinski in this case, the jurisprudence with respect to federal court review of agency interpretation of statutes, which has been well developed in recent decisions of this Court, is not apt to be advanced in the least, and the Petitioner does not argue that it would.

3. Equally well settled is the general principle, employed by Judge Kozinski, that statutory interpretations by agencies, even if entitled to deference under *Chevron*, are subject to independent determination by the judiciary where the agency interpretation raises grave constitutional doubts. While Judge Kozinski noted an arguable inconsistency between *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568 (1988) and *Rust v. Sullivan*, 500 U.S. 173 (1991), Judge Kozinski reconciled the inconsistency and applied the principles announced in both. Moreover, the Petitioner does not argue that there is any need for further elucidation by this Court on this question.

4. The Petitioner urges that the issue of *Mancari's* continued vitality following this Court's decision in *Adarand*

Constructors, Inc. v. Pena, 515 U.S. 200 (1995), is a constitutional question of extraordinary importance and should be decided by this Court. Pet. 10. Petitioner may be right that the issue is important. However, that question cannot be decided by this Court, at least for now, because it was not decided by the Ninth Circuit below,[1] and it has not been decided by any court of appeals or state court of last resort in any other case. Until the question has been presented to and decided by a lower court, any pronouncement by this Court on the question would be purely advisory.

It may well be that the debate over *Mancari's* viability has "intensified in the wake of this Court's holdings that full-blown strict scrutiny applies even to so-called 'benign' racial classifications, . . ." Pet. 14-15. However, this debate has thus far occurred only among commentators, as evidenced by the fact that not a single one of the authorities to which Petitioner cites on this point is a court decision. Pet. 14, n.7.

Petitioner may be right that, "[o]nly this Court can settle this extremely important debate." Pet. 15. But Petitioner is wrong that this Court should settle the question by rendering an advisory opinion in this case. However important the question may be, it is neither the case nor the controversy that is presented here.

Petitioner leads with its chin here, courting a ruling from this Court on broad questions of Indian and constitutional law that are not requisite to the relief it seeks. Inexplicably absent from the petition is any argument that the Ninth Circuit was

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1. As Petitioner acknowledges, Judge Kozinski's comment that "*Mancari's* days [may be] numbered," was only a prediction and, therefore, dictum. Thus, even if this Court were to review Judge Kozinski's decision in this case, whatever comment this Court may make about Judge Kozinski's dictum would, itself, be only dictum.

wrong to substitute its judgment for that of the IBIA's or that, having made that substitution, was wrong in its judgment that the Reindeer Act does not bar the importation of reindeer by non-natives. While one can only assume that the Petitioner's interest in the wider questions of Indian and constitutional law are genuine, it is not evident that the Petitioner has any direct stake in the outcome of those constitutional questions. As there are undoubtedly many on both sides of the issue with real and direct stakes in the question of what impact *Adarand* has had on *Mancari*'s formulation of the equal protection standard applicable to the review of Indian legislation, it should be left to those parties to litigate that issue.

5. The Petitioner argues that the Ninth Circuit's "revision of the *Mancari* standard . . . places in constitutional jeopardy much important Indian legislation . . ." Pet. 15. However, the Ninth Circuit did not, as a rule of decision in this case, revise the *Mancari* standard. Rather, the Ninth Circuit expressly avoided deciding the constitutional questions by rejecting the IBIA's interpretation: "We see no reason to unnecessarily resolve them when a less constitutionally troubling construction is readily available." App. 21a.

6. Even if the Ninth Circuit's opinion could be construed as having decided this case by applying *Mancari*, the Ninth Circuit did not revise the *Mancari* standard that special treatment of Indians will be upheld as long as the "special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . ." 417 U.S. at 555. Rather, the Ninth Circuit simply observed that the "tied rationally" requirement means, at the least, that the legislation must relate to "native land, tribal or communal status, or culture." App. 16a. This equation, and the Ninth Circuit's specific application of it to the IBIA's extension of the Reindeer Act, are completely consistent with *Mancari*. As the Ninth Circuit observed:

> Legislation that relates to Indian land, tribal status, self-government or culture passes *Mancari*'s rational relation test because "such regulation is rooted in the unique status of Indians as a 'separate people' with their own political institutions." *United States v. Antelope*, 430 U.S. 641 (1977).

App. 17a. Again, quoting from this Court's decision in *Antelope*, rendered three years after *Mancari*, the Ninth Circuit stated:

> [W]e do read [*Mancari*] as shielding only those statutes that affect uniquely Indian interests. *See, e.g., Antelope*, 430 U.S. at 646 ("Both *Mancari* and *Fisher* [v. *District Court*, 424 U.S. 382 (1976),] involved preferences or disabilities directly promoting Indian interests in self-government, whereas in the present case we are dealing, not with matters of tribal self-regulation, but with federal regulation of criminal *conduct within Indian country implicating Indian interests.*") (emphasis added by Judge Kozinski).

App. 18a. In short, the Ninth Circuit simply observed that it is not possible for legislation that does not affect "uniquely Indian interests" to satisfy the *Mancari* test that the legislation be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians."

The Ninth Circuit then considered the IBIA-created extension of the Reindeer Act to ban all but Alaska native ownership of reindeer in Alaska in the light of the *Mancari* rationally related test. The circuit court first observed that such a ban was akin to the "blanket exemption for Indians from all civil service examinations," which the Court in *Mancari* acknowledged would pose an "obviously more difficult

question," as distinguished from the employment preference at issue in *Mancari*, which only applied to the Bureau of Indian Affairs, "an agency created for the purpose of serving Indians." App. 16a. The court went on to observe that a total ban on non-native participation in an industry that is not uniquely native, and which applied whether the participation occurred "on the Seward Peninsula or in downtown Anchorage," is "unrelated to Congress' unique obligation toward the Indians." App. 16a-17a. This is a correct articulation and application of the *Mancari* rational relation test.

Because the Ninth Circuit, in considering whether the IBIA-created ban on non-native ownership of reindeer would pass the *Mancari* test, did nothing more than correctly articulate and apply that test, the Petitioner's arguments, that the decision below will result in "profound conflict, uncertainty and confusion in the law" (Pet. 17) and in a "proliferat[ion of] an incalculable amount of litigation challenging the numerous acts of Congress that single out Indians and Alaska Natives for different treatment," (Pet. 2-3) are wrong. If anything, the Ninth Circuit has lessened confusion by further elucidating the *Mancari* "tied rationally" test.

In its decision below, the Ninth Circuit expressed its opinion that, of the over two dozen statutes which were cited by the government and amici as singling out Indians for special treatment, "all relate to Indian land, tribal status, self-government, or culture." App. 16a. This is no less true of the Snyder Act of 1921, 25 U.S.C. §§ 13, *et seq.*, which was not included in the government and amici's list, but is emphasized by the Petitioner. Pet. 3, 23. The Ninth Circuit noted that the Snyder Act, which provides welfare benefits to Indians, provides those benefits only to those Indians who live "on or near" reservations. App. 18a.

The Petitioner attempts to create the impression that the Ninth Circuit's conclusion, from its application of the *Mancari*

test to the Reindeer Act, is "impossible to fathom" because, the Petitioner's argument goes, the Reindeer Act clearly affects "uniquely native interests." Pet. 19. However, the Petitioner deliberately confuses the issue. The issue is not whether some or even most of the other provisions of the Reindeer Act, none of which are at issue in this case, affect "uniquely Indian interests." Mr. Williams concedes, for the sake of argument, that those provisions of the Reindeer Act by which Congress condemned every reindeer in Alaska owned by non-natives, gave those reindeer to the natives, and prohibited non-natives from thereafter reacquiring any of those reindeer or their progeny, affect "uniquely Indian interests" and may be related to Congress' unique obligation toward Alaska natives. However, those portions of the Reindeer Act were not disturbed by the opinion of the Ninth Circuit below.

The only provision of the Reindeer Act that is at issue in this case, and the only one struck down by the Ninth Circuit, is the provision, read into the Reindeer Act by the IBIA, that non-natives in Alaska are totally barred from owning imported reindeer. The Ninth Circuit was obviously correct that this narrow provision of the Reindeer Act does not affect "uniquely native interests."

Moreover, while the Reindeer Act as a whole may, at an earlier time, have affected uniquely native interests,[2] that is not the case today. As Judge Kozinski noted,

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2. The Petitioner asserts that,

> during the century that [reindeer herding] has existed it has become an integral component of the socioeconomic and cultural structure of those Native villages in which it takes place,

and that, "the [reindeer] industry was initiated by the government for Alaska. Natives in significant part to compensate them for the loss of other natural resources depleted by non-Native newcomers." Pet. 20.

> the economic and subsistence needs of natives have changed dramatically in the interim — most notably, by passage of the Alaska Native Claims Settlement Act in 1971, which gave natives 4 million acres of land, almost $1 billion, and shares of stock in newly-created native corporations.

App. 20a.

Thus, the reasoning of the IBIA, that the Reindeer Act must be interpreted to prohibit Mr. Williams from owning any reindeer, even imported reindeer, because Congress intended with the Reindeer Act to purchase a "reservation for Alaska natives, consisting of the reindeer industry in Alaska" (App. 67a), is clearly wrong. Even if Congress' intention had been to "reserve the reindeer industry in Alaska" for Alaska natives, Congress has since revoked that and all other reservations in Alaska save one with the passage of ANCSA. *See Alaska v. Native Village of Venetie Tribal Government*, 118 S. Ct. 948, 950 (1998). ("Equally clearly, ANCSA ended federal superintendence over the Tribe's lands by revoking all existing Alaska reservations but one, and by stating that ANCSA's settlement provisions were intended to avoid a "lengthy wardship or trusteeship.") (citations omitted).

II.

THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT OR STATE COURT.

The Petitioner invokes Rule 10(a) as a reason for this Court to review this case. Pet. 25-27. However, as in other parts of the petition, the Petitioner misstates the matter. The Ninth Circuit's decision, reversing the IBIA's interpretation of the Reindeer Act as including a provision banning non-native

ownership of imported reindeer, does not conflict with the decision of any other court, state or federal. Indisputably, no other court has ever been confronted with or has ever ruled upon the question.

The Petitioner argues that

> other courts of appeals, as well as the state courts, that have been called upon to the apply the *Mancari* standard of equal protection review, have done so without . . . convert[ing] the standard to a 'uniquely Indian interests' test.

Pet. 25. Even assuming that the Ninth Circuit did revise the *Mancari* test as Petitioner argues, the conflict with the other courts that have applied *Mancari* would not be a real or intolerable conflict. Rather, the conflict would be merely an inconsistency in dicta or general principles.

Moreover, as set out above, the Ninth Circuit did *not* articulate a new test to apply to equal protection challenges of Indian legislation. First, it did not articulate a new test, because in its inquiry of whether the IBIA's interpretation would result in a provision that raised grave, constitutional doubts, the Ninth Circuit correctly applied the existing *Mancari* "rationally tied" test.

Second, the Ninth Circuit did not actually apply the *Mancari* test at all. The court expressly did not decide that a total ban on non-native ownership of imported reindeer in Alaska would fail *Mancari*'s equal protection test. Rather, the court held that, because such ban would "push the constitutional envelope" (App. 13a), it was not required under *Chevron* to uphold the IBIA's interpretation. Being thus freed of the requirement to give deference to the IBIA's interpretation, the

Ninth Circuit substituted its own statutory construction and held that the IBIA's interpretation was wrong.

To put the matter another way, if Congress were tomorrow to enact such a total ban, the decision below does not foreclose any court, including any court in the Ninth Circuit, from applying without revision the rule of *Mancari* and deciding that the total ban is permissible because it is tied rationally to Congress' unique obligations to Alaska natives. Thus, Judge Kozinski's decision cannot be said to conflict with the decision of any other court.

Even less did the Ninth Circuit hold in this case that traditional equal protection analysis, which requires compelling state interest to justify invidious racial discrimination, applies to all legislation affecting Indians and Alaska natives. Rather, Judge Kozinski stated that the "Supreme Court's recent decision in *Adarand* only adds to our constitutional doubts about the IBIA's interpretation of the Reindeer Act." (App. 19a). While Judge Kozinski mused that "*Mancari*'s days [may be] numbered," this musing was not tantamount to a decision that the IBIA-created extension of the Reindeer Act must be subjected to strict scrutiny. To the contrary, his consideration of the logical implications of *Adarand* was made solely to reinforce his point that a total ban on the ownership by non-natives of imported reindeer "pushes the constitutional envelope" and that if Congress meant to enact such a ban, which encroaches so on constitutional boundaries, it must have done so explicitly. (App. 12a-13a).

III.

THE NINTH CIRCUIT'S DECISION IS NOT SIGNIFICANT TO THE AGENCY'S ADMINISTRATION OF THE REINDEER ACT.

As the Ninth Circuit noted in its opinion below, the Area Director for the Bureau of Indian Affairs in Alaska, which is the agency charged with the administration of the Reindeer Act, when first confronted with the issue in this case, determined, through the Regional Solicitor's Office, that the Reindeer Act does *not* bar Respondent Williams from importing reindeer to Alaska. (App. 6a). It was only after the Petitioner appealed this determination to the Secretary of Interior that the IBIA reversed the decision of the Area Director and ruled that such a ban must be implied from the general purposes of the Reindeer Act. (App. 7a).

Thus, the Ninth Circuit's decision, which is the same as the Area Director's original decision, obviously does not present a problem for the Bureau of Indian Affairs in its administration of the Reindeer Act. Underscoring this is the fact that none of the federal respondents, who were the original defendants in the underlying case, have petitioned this Court for review of the Ninth Circuit's decision. This fact is of even broader significance, given that the Solicitor General's Office routinely attempts to apply this Court's own standards in determining whether to petition for review. Robert L. Stern *et al.*, *Supreme Court Practice*, Seventh Edition, p. 164, Bureau of National Affairs, Inc., Washington, D.C.

CONCLUSION

This case has no immediate importance beyond the particular facts and parties involved. Even with the decision of the Ninth Circuit, the seventeen reindeer herders who make up the Petitioner, and the few other Alaska natives who participate in the reindeer industry, still have, in Judge Kozinski's words, their "big leg up in the business" (App. 7a). They still have the Congressional mandate to the Secretary of the Interior to organize and manage a reindeer industry for Alaska natives; they still have the prohibition on any non-native getting into the business by purchasing any native or government-owned existing reindeer stocks; and they still have exclusive grazing privileges on federally owned lands in Alaska.

On the other hand, even if this case were reviewed and reversed, the only impact would be that Respondent Williams, who husbands his reindeer on his privately owned farm located fifty miles from Alaska's largest city, and 500 miles from Petitioner's herds, would have to dispose of his animals. While this would be a devastating result for him, it is of no great moment to anyone else, including the Petitioners.

Finally, no pronouncements by this Court on Indian or constitutional law would be required for reversal, as this case is, at its bottom, a case about the interpretation of a 1937 statute that applies only to Alaska. For reasons Respondent Williams cannot fathom, the Petitioner wishes to convert this case into a springboard to obtain an advisory opinion of this Court as to the effect that *Adarand* has on *Mancari*. The Court should resist the suggestion and reject this petition for a writ of certiorari.

Respectfully submitted,

WALTER T. FEATHERLY
Counsel of Record
KOVAL & FEATHERLY, P.C.
Attorneys for Respondents Thomas E. Williams, Alaska Reindeer Herders, Inc., and Reindeer Herders Association, Inc.
601 West Fifth Avenue
Suite 900
Anchorage, Alaska 99501
(907) 258-6600